National Union of Hotel, Bar & Restaurant Workers Peninsular Malaysia & Anor v Mahsyur Mutiara Sdn Bhd (Sheraton Langkawi Beach Resort)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-272–07 OF 2016
ZAWAWI SALLEH, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
30 AUGUST 2017

Labour Law — Wages — Whether wages included 'service charge' — Collective agreement ('CA') between hotelier and union representing hotel workers provided that on retirement employees would be paid certain number of days' wages for each year of their employment as benefit — CA also provided that 90% of all service charges collected by hotelier from its customers would be divided and paid monthly to all its full-time employees during tenure of their employment — Whether term 'wages' in clause on payment of retirement benefits in CA included not just basic salary but also the service charge — Whether although term 'wages' not defined in CA parties clearly intended it to include more than 'basic salary' — Whether correct approach to adopt definition in s 2 of the Employment Act 1955 that 'wages' meant 'basic wages and all other payments in cash payable to employee for work done in respect of his contract of service'

The sole issue in the instant appeal was whether 'wages' that was contractually payable by a hotelier to its employees as a retirement benefit referred only to an employee's basic wage or whether it also included 'service charge' that the hotel charged its customers. Under article 27(b) of a collective agreement ('CA') between the first appellant ('the union') and the respondent (which ran a hotel), an employee of the respondent who retired after five years or more of service was entitled to be paid a retirement benefit of 20 days' wages for each year of his/her service. Clause 12(a) of the CA provided that the respondent was only entitled to 10% of the service charge it collected from its customers while the remaining 90% had to be distributed to all its employees listed under Appendix B of the CA excluding part-time workers and temporary, casual and retired staff. A member of the union ('Zurriyani') who retired after working for the respondent as a hotel room attendant for 20 years was informed by the respondent that she would be paid a retirement benefit that was calculated based on her last-drawn basic salary without the inclusion of any service charge. The union complained to the Industrial Court that the respondent had breached article 27 of the CA and submitted that in addition to 20 days' of her last-drawn salary, Zurriyani should also be paid 20 days' of service charge based on the last service charge amount she had received. The Industrial Court agreed and ordered the respondent to comply with article 27 and pay Zurriyani the

sum computed by the union. On the respondent's application, the High Court quashed the Industrial Court's award holding that 'service charge' was not part of 'wages' and should not have been included in the calculation of the retirement benefit. The High Court held that since only serving employees of the respondent were entitled to the service charge, and not retired employees, article 12(a) of the CA did not apply to the calculation of the retirement benefit under article 27 of the CA. The High Court remitted the case back to the Industrial Court for it to re-compute Zurriyani's retirement benefit based solely on her last-drawn basic salary. In the instant appeal, the union submitted that the High Court's decision was wrong because Zurriyani was not claiming for service charge after her retirement but for the payment of service charge due to her as part of her wages in computing her retirement benefit.

Held, allowing the appeal, setting aside the decision of the High Court and restoring the Industrial Court's award:

(1) In the light of the definition of 'wages' in s 2 of the Employment Act 1955 ('the Act'), the word 'wages' in article 27 of the CA had to include all payments paid to employees for work done in respect of their contract of service, which was not only confined to basic salary (see paras 17 & 20).

(2) The CA in the instant case was silent on the definition of 'wages', but the intention of the parties was clear in that they had expressly used the word 'wages' and not 'basic salary' in article 27 for the calculation of the retirement benefit. The correct approach was to adopt the definition in the Act. Going by the authorities on the point, there was no doubt that 'service charge' formed part of 'wages' for the purpose of computing the retirement benefit (see paras 27–28).

(3) The High Court's decision was unreasonable in the *Wednesbury* sense, meaning that no reasonable tribunal properly applying the law would have possibly come to that decision (see para 32).

(4) The issue in the instant appeal was not about an employee claiming for service charge payment after her retirement. Rather, it was a case on how the retirement benefit under article 27 of the CA was calculated; more particularly, it was on how the '20 days' wages for each year of service' was calculated. Hence, article 12 of the CA was clearly irrelevant to the issue at hand (see para 31).

[Bahasa Malaysia summary

Satu-satunya isu di dalam rayuan ini adalah sama ada 'wages' yang secara kontrak mesti dibayar oleh pemilik hotel kepada pekerja-pekerjanya sebagai faedah persaraan hanya merujuk kepada gaji asas pekerja atau sama ada ia juga termasuk 'service charge' yang hotel tersebut caj pelanggan-pelanggannya. Di bawah artikel 27(b) perjanjian kolektif ('PK') di antara perayu pertama ('kesatuan') dan responden (yang menguruskan hotel), pekerja responden yang

bersara selepas perkhidmatan lima tahun atau lebih berhak untuk dibayar faedah persaraan sebanyak gaji 20 hari bagi setiap tahun perkhimatannya. Klausa 12(a) PK memperuntukkan bahawa responden hanya berhak kepada 10% caj perkhidmatan yang dikutipnya daripada pelanggan-pelanggannya sementara baki 90% terpaksa diagihkan kepada kesemua pekerja-pekerjanya yang disenaraikan di bawah Lampiran B PK tidak termasuk pekerja-pekerja separuh masa dan sementara, biasa dan kakitangan bersara. Seorang ahli kesatuan ('Zurriyani') yang bersara selepas bekerja untuk responden sebagai atendan bilik hotel selama tempoh 20 tahun diberitahu oleh responden yang dia akan dibayar faedah persaraan yang dikira berdasarkan atas gaji asas yang terakhir tanpa memasukkan apa-apa caj perkhidmatan. Kesatuan mengadu kepada Mahkamah Perusahaan bahawa responden telah melanggar artikel 27 PK dan berhujah bahawa sebagai tambahan kepada 20 hari terhadap gaji terakhirnya, Zurriyani patut juga dibayar 20 hari caj perkhidmatan berdasarkan atas jumlah caj perkhidmatan yang terakhir yang diterimanya. Mahkamah Perusahaan bersetuju dan memerintah responden untuk mematuhi artikel 27 dan membayar Zurriyani jumlah yang dikira oleh kesatuan. Ats permohonan responden, Mahkamah Tinggi membatalkan award Mahkamah Perusahaan dengan memutuskan bahawa 'service charge' bukan sebahagian 'wages' dan tidak patut dimasukkan di dalam pengiraan faedah persaraan. Mahkamah Tinggi memutuskan bahawa memandangkan hanya pekerja-pekerja yang berkhidmat dengan responden berhak kepada caj perkhidmatan tersebut, dan bukan pekerja-pekerja yang telah bersara, artikel 12(a) PK tidak digunapakai kepada pengiraan faedah persaraan di bawah artikel 27 PK. Mahkamah Tinggi meremit kes semula kepada Mahkamah Perusahaan untuk mengira semula faedah persaraan Zurriyani berdasarkan semata-mata atas gaji asas terakhirnya. Dalam rayuan ini, kesatuan berhujah bahawa keputusan Mahkamah Tinggi adalah salah kerana Zurriyani bukan menuntut untuk caj perkhidmatan selepas persaraannya tetapi bagi bayaran caj perkhidmatan yang kena dibayar kepadanya sebagai sebahagian gajinya dalam mengira faedah persaraannya.

Diputuskan, membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan mengembalikan award Mahkamah Perusahaan:

(1) Berdasarkan definisi 'wages' dalam s 2 Akta Pekerjaan 1955 ('Akta'), perkataan 'wages' di dalam artikel 27 PK perlu memasukkan kesemua bayaran yang dibayar kepada pekerja-pekerja bagi kerja yang dibuat berkenaan kontrak perkhidmatan, yang bukan hanya terhad kepada gaji asas (lihat perenggan 17 & 20).

(2) PK dalam kes ini adalah senyap atas definisi 'wages', tetapi niat pihak-pihak adalah jelas di mana mereka telah secara nyata menggunakan perkataan 'wages' dan bukan 'basic salary' di dalam artikel 27 bagi pengiraan faedah persaraan. Pendekatan yang betul adalah untuk menggunapakai definisi di dalam Akta. Mengikut autoriti atas

poin, tidak terdapat keraguan bahawa 'service charge' membentuk sebahagian 'wages' bagi tujuan mengira faedah persaraan (lihat perenggan 27–28).

(3) Keputusan Mahkamah Tinggi adalah tidak munasabah dalam inti pati *Wednesbury*, bermaksud bahawa tiada tribunal munasabah yang menggunapakai secara betul undang-undang akan berkemungkinan mencapai kepada keputusan tersebut (lihat perenggan 32).

(4) Isu dalam rayuan ini bukan mengenai pekerja menuntut untuk bayaran caj perkhidmatan selepas persaraannya. Tetapi ia adalah kes atas bagaimana faedah persaraan di bawah artikel 27 PK dikira; terutamanya, ia adalah bagaimana gaji '20 days' untuk setiap tahun dikira. Maka, artikel 12 PK jelas tidak relevan kepada isu di sini (lihat perenggan 31).]

Notes

For cases on wages in general, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2162–2163.

Cases referred to

Abdul Aziz Abdul Majid & 141 Ors v Kuantan Beach Hotel Sdn Bhd [2012] 1 LNS 1294, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Funk David Paul v Asia General Asset Bhd [2014] 1 MLJ 681, CA (refd)

Hotel Fortuna Management Services Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia [2000] ILJU 100; [2000] 2 ILR 163, IC (refd)

Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd [1988] 1 MLJ 245; [1988] 1 CLJ 270, SC (refd)

Mohd Faizal bin Md Sari dan satu lagi lwn Touch Mobileguards Sdn Bhd [2015] MLJU 2282; [2016] 1 CLJ 44, HC (refd)

Peninsular Malaysia v The Plaza Hotel Kuala Lumpur [2015] 1 ILR, IC (refd)

Port View Seafood Village Sdn Bhd v Rocelyn Tubal Raneses [2010] MLJU 1664; [2011] 4 CLJ 959, HC (refd)

Legislation referred to

Employment Act 1955 s 2
National Wages Consultative Council Act 2011
Trade Unions Act 1955

Appeal from: Application For Judicial Review No 25–76–05 of 2015 (High Court, Kuala Lumpur)

Ten Yee Phor (Norsuhaila Mat Nudin with him) (Ten & Colin) for the first appellant.

A *Hariharan Tara Singh (Azlan Abdul Razak with him) (CK Oon & Co) for the respondent.*

Zawawi Salleh JCA (delivering judgment of the court):

B INTRODUCTION

[1] This appeal is against the whole of the decision of the learned High Court judge ('the learned judge') dated 19 May 2016, granting a certiorari order to quash Award No 151 of 2015 which was handed down by the C Industrial Court on 15 July 2015. By the said award, the Industrial Court ordered the respondent to comply with article 27 cl (b)(iii) of the fourth collective agreement ('the said CA') and pay the sum of RM40,099.17 as retirement benefits to Puan Zurriyani through the first appellant within 14 days of the service of the award. In quashing the award, the learned judge, inter D alia, held that the service charge is not part of wages and should not be included in the calculation of the retirement benefits and ordered that the matter be remitted back to the Industrial Court for the calculation of Puan Zurriyani's retirement benefits based on salary only.

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[2] We heard the appeal on 17 January 2017 and after hearing parties' submissions, we allowed the appeal, set aside the decision of the learned judge and restored the award of the Industrial Court. We now give the detailed reasons for our decision.

F FACTS OF THE CASE

[3] The facts of the case, as culled from the learned judge's ground of judgments ('GOJ') and the submissions of the parties may be summarised as G follows:

(a) the first appellant is a trade union registered under the Trade Unions Act 1955 and Puan Zurriyani is a member of the first appellant. The respondent is a company registered under the Companies Act 1965 and operates a hotel known as Sheraton Langkawi Beach Resort. Puan H Zurriyani had worked with the respondent since 5 May 1993 as a room attendant and retired on 17 February 1013 upon attaining the age of 50;

(b) the first appellant and the respondent had entered into the said CA on 6 February 2010 for a period from 9 January 2009 until 31 August 2012. I It is an important term contained in the said CA that it shall continue to remain in force until 31 August 2012 and thereafter unless superseded by a new collective agreement or award;

(c) the respondent had by a letter dated 18 February 2013 to Puan Zurriyani confirmed her retirement on 27 February 2013 wherein her retirement

benefits had been calculated as follows:

Basic salary of RM1,178/30 days x 403 days = RM15,824.46.

(d) the respondent had failed to pay the retirement benefits to Puan Zurriyani as stated in the said letter dated 18 February 2013. Therefore, Puan Zurriyani had lodged a complaint of the respondent's failure with the first appellant's house committee who then brought the matter to the national committee of the first appellant;

(e) the first appellant then informed the respondent that until 30 January 2014, no retirement benefits whatsoever was paid by the respondent to Puan Zurriyani and the service charge, which is part of wages, had not been included in the calculation of retirement benefits as per the said letter dated 18 February 2013;

(f) consequently, the first appellant lodged a complaint of 'non-compliance' with article 27 of the said CA to the Industrial Court. The first appellant had requested the Industrial Court to decide on the calculation of the retirement benefits under article 27 cl (b)(ii), based on the following formula:

RM1,178 x RM1,807.05 x 20 (days) x 20.15 years = RM40,099.17.

(The sum of RM1,178 being the last drawn salary and RM1,807.05 being the last service charge received.);

(g) as alluded to earlier, the Industrial Court had on 10 February 1015 handed an Award No 51 of 2015, where the Industrial Court had ordered the respondent to comply with article 27 of the said CA and pay the sum or RM40,099.17 as retirement benefit to Puan Zurriyani;

(h) being dissatisfied with the award, the respondent applied for judicial review to quash the award. The learned judge granted the application and held, inter alia, that the service charge is not part of wages and should not be included in the calculation of the retirement benefits and ordered the matter to be remitted back to the Industrial Court for the calculation of Puan Zurriyani's retirement benefits based on basic salary only; and

(i) being dissatisfied with the learned judge's decision, the first appellant and the second appellant appealed to this court. Hence, this appeal before us.

ISSUE

[4] The single question which had been argued before us is whether the service charge should be included in the calculation of wages in the retirement benefits on Puan Zurriyani.

A FINDINGS OF THE LEARNED JUDGE

[5] In granting a certiorari order to quash the award handed down by the Industrial Court, the learned judge, inter alia, reasoned that the Industrial Court had erroneously made a finding of both fact and law that the retirement benefits should be calculated based on 'wages' which included the service charge. According to the learned judge, by virtue of article 12 of the said CA, the entitlement to the service charge is to be enjoyed by all serving employee of the respondent. The retired employees are not eligible for the service charge. Therefore, any retired employee of the respondent, in pursuit of his retirement benefits, must be prevented from claiming for the service charge to be included within the meaning of 'wages' under article 27 of the said CA. In other words, the learned judge ruled that article 12 of the said CA does not apply to the calculation of retirement benefits under article 27 of the said CA.

[6] In support of the decision, Her Ladyship relied on the decision of *National Union of Hotel, Bar & Restaurant Workers*, *Peninsular Malaysia v The Plaza Hotel Kuala Lumpur* [2015] 1 ILR where the Industrial Court held that the service charge should not be included in the calculation of wages in the retirement benefits.

[7] The learned judge also placed reliance on the decision of the Industrial Court in *Mohd Faizal bin Md Sari dan satu lagi lwn Touch Mobileguards Sdn Bhd* [2015] MLJU 2282; [2016] 1 CLJ 44 where the Industrial Court's decision in *National Union of Hotel, Bar & Restaurant Workers*, *Peninsular Malaysia v The Plaza Hotel Kuala Lumpur* has been cited and followed. The relevant excerpt is reproduced below:

> Di samping kedudukan di atas, nas autoriti di bawah ini juga jelas menunjukkan adanya perbezaan antara gaji pokok dengan pembayaran kewangan yang lain. Gaji pokok telah dibezakan dengan bayaran kewangan yang lain dalam s 2 Akta Kerja 1955. Begitu juga dalam *National Union of Employee in Companies Manufacturing Rubber Products v Ansell Companies Operating in Melaka (Ansell Malaysia Sdn. Bhd/Ansell Medical Sdn Bhd/Ansell NP Sdn Bhd)* [2014] 4 ILR 381, gaji pokok dengan jelas tidak termasuk elaun kewangan seperti mana diputuskan:
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> > (3) On the stoppage of the meal allowances for the affected workmen when their basic wages had been increased pursuant to the Minimum Wages Order 2012, the term 'basic wages' did not include monetary allowances. When the minimum wages of RM900 had been implemented in Peninsular Malaysia on 1 January 2013 pursuant to the said order, the basic wages that had become payable was RM900 per month.
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> Begitu juga selanjutnya dalam *National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia v The Plaza Hotel Kuala Lumpur* [2015] 1 ILR 443 diputuskan berkenaan dengan caj perkhimatan dengan gaji pokok begini:

Held:

(3) There is no definition of the term 'wages' or 'salary' in the Industrial Relations Act 1967. In decisions of the Industrial Court, both the terms 'wages' and 'salary' have been used. The term 'wages' is defined in the Employees Provident Fund Act 1991, the Employment Act 1955 and the Employees' Social Security Act 1969 but its definition is not uniform. The phrase 'clean wage' has now gained currency in the hotel industry and it means that the employees are to be paid a basic wage or basic salary without a service charge.

THE APPEAL

[8] Learned counsel for the first appellant launched a frontal attack against the decision of the learned judge and vehemently argued that the learned judge had committed an error of law and of fact and Her Ladyship's decision was tainted with *Wednesbury* unreasonableness in holding that the Industrial Court had failed to take into consideration that article 12(a) of the said CA does not apply to the calculation of retirement benefits under article 27 of the said CA.

[9] According to learned counsel, the learned judge also had committed an error of law and fact when Her Ladyship failed to appreciate that the first appellant was not claiming the service charge for Puan Zurriyani after her retirement but the inclusion of the service charge payment is part of the 'wages' for the purpose of computation of retirement benefits.

[10] Learned counsel contended that the inclusion of the service charge as part of the wages in the calculation of retirement benefits is the same as the inclusion of the service charge in the calculation of the termination or retrenchment benefits under the Employment Act 1955 (see *Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd* [1988] 1 MLJ 245; [1988] 1 CLJ 270).

OUR FINDINGS

[11] We begin our discussion with reference to the relevant articles of the said CA. Article 12(a) of the said CA states as follows:

The Hotel shall retain 10% of the 100% service charge imposed on all bills monthly. The remaining 90% service charge shall be fully distributed to all employees covered within the scope of this Agreement as listed in Appendix B, except part-timers, temporary, casual and retired employees.

[12] Article 27 of the said CA on retirement benefits of the said CA is in the following terms:

Clause (a) On the twenty-five (25th) month of service, the hotel shall contribute each month fifteen percent (15%) of the employee's basic salary for that month to

A the Employees Provident Fund (EPF). Such contribution shall be deemed to be inclusive of the Hotel's contribution to the EPF as prescribed by the law.

Clause (b) In addition to the above benefits the hotel shall pay a retirement benefit to employees who retire from the hotel as follows:

B

Years of service	*Wages for each year service*
(i) Less than two (2)	10 days
(ii) Two (2) or more but less than five (5)	15 days
(iii) Five (5) or more	20 days.

C (Emphasis added.)

[13] The inception and concept of service charge has been succinctly explained by the learned Chairman of the Industrial Court at pp 7–8 of the said award that:

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... Prior to the introduction of the service charge, as was stated earlier, the hotels practised the 'tipping system'. Under this system, the customer paid any amount he liked to show his appreciation and generosity and it was not mandatory. Hence, it was gratuitous in nature. Further, only a certain group of employees enjoyed the

E bounty. As the hotel industry modernised, a more equitable system was introduced which ensured a fair distribution of the customers 'generosity to all employees irrespective of their duties'. Today a fixed service charge (normally 10%) is levied on the customers' bills, which must be paid. The money is paid into a fund called the service charge fund. What started off as a trade practice has now been incorporated into collective agreements whereby 10% of the fund is taken by the hotel to defray

F the administrative costs incurred for the maintenance of the fund and the remaining 90% is distributed to the eligible employees in accordance with the service points allocation under the collective agreement. Hence, the hotels today are contractually bound to make monetary payments to the employees based on their service charge points. The hotel in the instant case imposes a 10% service charge on every bill

G issued to its customer and Article 12 governs the distribution of the service charge. The money is pooled into a fund to be paid to the employees of the hotel. Article 12 of the Collective Agreement executed by the hotel and union states that the hotel shall retain10% and 90% shall be fully distributed to all employees covered within the scope of the Collective Agreement ad listed in Appendix B ...

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[14] The learned Chairman went on to say:

The service charge system is unique to the hotel industry. We must note two important features of the system. One is that the money does not come from the employer but collected from the customers of the Hotel and put in a fund. The fund

I is jointly owned by the hotel and its employees. The second is that pure income for the employee and it is paid to the employee under his contract of service with the hotel.

[15] It is clear, therefore, the customers did not pay the service charge

directly to the respondent's employees, but rather the service charge is collected by the respondent and paid to its employee for services rendered and its distribution is governed by article 12 of the said CA together with the employee's salary every month.

[16] The critical question to be answered is this: whether the word 'wages' in article 27 of the said CA should include all the payment paid to employee for the work done in respect of his contract of service or should it only confine to basic salary.

[17] 'Wages' is not define in the said CA. However, s 2 of the Employment Act 1955 provides that:

> 'wages' means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include —
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> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
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> (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;
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> (c) any travelling allowance or the value of any travelling concession;
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> (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
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> (e) any gratuity payable on discharge or retirement; or
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> (f) any annual bonus or any part of any annual bonus.

[18] The words in s 2 of the Employment Act 1955 were explained succinctly by the Supreme Court in the case of *Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd* at pp 27–28 as follows:

> It seems that the words 'work done' in the definition of 'wages' are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer ex gratia not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

[19] The Court of Appeal in the case of *Funk David Paul v Asia General Asset Bhd* [2014] 1 MLJ 681 at p 689 held as follows:

> Wages in our view is a term referring to payments for service or works rendered on a regular basis; hence we have the terms or saying 'my weekly or monthly wages' in ordinary parlance. This meaning would explain the exclusion of (a) service charge

(b) overtime payment (c) gratuity or (d) retirement benefit from the definition of 'wages' in s 2 wages is but one species of remuneration.

[20] We are in full agreement with the view expressed by the learned Chairman of the Industrial Court that in the light of the definition as provided for by the Employment Act 1955, the word 'wages' in article 27 of the said CA is to include all payments paid to employees for work done in respect of his contract of service which not only confine to basic salary. Indeed, the Industrial Court's award followed a long line of authority on the issue.

[21] The learned Chairman had dealt with the definition of wages in the said award at pp 10–11 as follows:

> The material words in section 2 are 'work done in respect of his contract of service'. In the Supreme Court case of *Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd* [1988] 1 MLJ 245 at p 248 Wan Hamzah SCJ stated as follows:
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> > It seems that the words 'work done' in the definition of 'wages' are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer ex gratia not for work done or to be done, and not in connection with the contract of service, is not part of the wages.
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> What this case highlights is that payment must be made in connection with the employee's contract of service and it must be for work done, for it to be regarded as part of wages. But where the payment is made as gift or as a favour then it cannot be part of wages. In the present case, the hotel had paid the service charge to aggrieved retiree in connection with her contract of employment as a cook by virtue of article 12 of the collective agreement. The hotel was contractually bound to pay in accordance with the service charge points as stated in Appendix B under article 12 Clause (a). Further, by virtue of s 17(2) of the Industrial Relations Act 1967 the said article of the collective agreement is also an implied term of her contract of employment. *Hence, it is clear from the facts of the case that the hotel paid the service charge to her in return for her services as a cook and not given as a gift. As such, the payment of service charge points to her would be regarded as wages under s 2 of the Employment Act 1955 and further it has not been excluded by its definition.* (Emphasis added.)

[22] With respect, the learned judge seems to us to have fallen into very serious error in deciding that the service charge should not be included in the calculation of wages in the retirement benefits of Puan Zurriyani. The cases relied upon by the learned judge are cases on minimum wages under the National Wages Consultative Council Act 2011 and not under the Employment Act 1955. These cases are rightly decided because the minimum wages does not include the service charge.

[23] There is a plethora of authorities in support of the conclusion reached

by the learned Chairman. To name but a few are as follows.

[24] In the Court of Appeal case of *Abdul Aziz Abdul Majid & 141 Ors v Kuantan Beach Hotel Sdn Bhd* [2012] 1 LNS 1294, Clement Skinner JCA had this to say:

> Service Charge Issue
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> [35] With regard to the issue of the non-inclusion of service charge in the payment of termination benefits to the appellants, the evidence shows that COW2 and COW3 conceded that service charges were not included in the calculation of the appellant's termination benefits. The learned judge of the High Court first declined to deal with the issue of service charge as she felt that what was before the Industrial Court was a reference under s 20 of the Industrial Relations Act 1967 and not a reference for non-compliance with a collective agreement under s 56. But the learned High Court judge went on to say that in fact, the element of service charge was already included in the computation of termination benefits as set out in the schedule to the termination letter.
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> [36] We find the learned High Court judge erred in taking the approach she did. *In the first place it is settled law that service charge is part of the wages of an employee*. See *Hotel Equatorial (M) Sdn Bhd v Thomas George*, High Court Rayuan Sivil R2–16–6–95 which was affirmed by the Court of Appeal; and *Bukit Jambul Hotel Development Sdn Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran, Semenanjung Malaysia* [2005] 2 ILR 927 at p 943.
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> [37] In the second place, pursuant to article 29.1 of the collective agreement the hotel was obliged to distribute 90% of all service charge collected to its employees in accordance with appendix 'B' thereto.
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> [38] In the third place, article 39 of the collective agreement provides that where an employee's services is terminated for retrenchment by reason of redundancy, the employee shall be entitled to retrenchment benefits *based on the last drawn wages* for every year of service. Accordingly, in our judgment, in a s 20 reference, the issue of service charge which is part of wages, will have to be dealt with in computing termination benefits or back wages. The schedule to the termination letter shows that the service charge element listed therein is in respect of salary paid and not in respect of termination benefits. (Emphasis added.)

[25] In *Port View Seafood Village Sdn Bhd v Rocelyn Tubal Raneses* [2010] MLJU 1664; [2011] 4 CLJ 959, David Wong Dak Wah J (as His Lordship then was) had carried out an exhaustive recounting of the line of authorities relating to wages and concluded at para 13 of the GOJ as follows:

> [13] Reverting to the issue at hand and applying the established principle of constructing legislation of giving the words their natural meaning and bearing in mind that there was no amendment to the *Employment Act* after the *Pereira* case, I concur with the interpretation given by the learned Chairman. The pivotal words in my view are 'work done in respect of his contract of service' and as long payments are made because of that service, it is caught by the definition of wages. *In this case there*

A *cannot be any denial that the 'service charge' is payment made for work done in respect of his contract of service'. My view is of course fortified by the decision of the Privy Council*. (Emphasis added.)

B **[26]** In the case of *Hotel Fortuna Management Services Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia* [2000] ILJU 100; [2000] 2 ILR 163, the Industrial Court decided that:

It is clear from the above that service charge is not excluded as an element of 'wages'.

C It is further pertinent to note that there is no definition of 'wages' in the collective agreement.

Now although the hotel has referred to the definition of 'wages' in the EPF Act 1951 and the EPF Guidelines it is abundantly clear that the purpose of that definition is to set down those elements of remuneration for which a contribution has to be made by both parties to the EPF. There is no dispute that service charge does not D attract EPF contribution. The hotel's submission is not relevant to the issue at hand.

It is the unanimous finding of the court that as the Employment Act 1955 does not exclude service charge from its definition of 'wages' and the collective agreement is silent on this point, service charge therefore forms a part of 'wages' for the purpose of computing retirement and retrenchment benefits. (Emphasis added.)

E

[27] The fact in this instant appeal is similar to the facts in *Hotel Fortuna* case. The said CA is also silent on the definition of 'wages'. But the intention of the parties to the said CA is clear in that parties have expressly stated in F article 27 of the said CA on retirement benefits by using the word 'wages' and not basic salary.

[28] In our view, the correct approach is to adopt the definition in the Employment Act 1955. Going by the authorities cited above, we entertained G no doubt that the service charge forms part of 'wages' for the purpose of computing retirement benefits.

[29] This is, however, not the end of the matter. Learned counsel for the respondent submitted that article 12 of the said CA governs the distribution of H service charge collected to all serving employees at the time the service was collected and it is clear that once an employee had retired, he would not be entitled to the service charge even if he or she is re-employed on contract. According to the learned counsel for the respondent, article 12(a) of the said CA is clear and ambiguous on this point.

I

[30] We have no qualms with the submission. However, we are of the opinion that the learned judge had failed to appreciate that the first appellant's case before the Industrial Court was about non-compliance of article 17 of the said CA and not about article 12 of the said CA.

[31] Article 27 of the said CA is on payment of retirement benefits whereas article 12 of the said CA is on the monthly distribution of service charge to the employees of the respondent. Therefore, article 12 of the said CA is clearly irrelevant to the issue at hand. To be sure, the issue in this instant appeal is not about an employee's claiming for service charge payment after her retirement. Rather, it is a case on how the retirement benefits is calculated under article 27 of the said CA, more particularly, it is on how the '20 days wages for each year of service' is calculated. Hence, article 12 of the said CA has no relevance to calculation of retirement benefit.

CONCLUSION

[32] We had carefully considered the submissions urged upon us by the parties. We have reached the inescapable conclusion that the learned judge's decision was unreasonable in the *Wednesbury* sense meaning that no reasonable tribunal properly applying the law would have possibly come to that decision.

[33] For all of these reasons, we allowed the appeal, set aside the decision of the learned judge and restored the award rendered by the Industrial Court with costs of RM10,000. So ordered.

Appeal allowed.

Reported by Ashok Kumar